

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KELLY LAVONNE WARGNIER,  
Plaintiff,  
v.  
NATIONAL CITY MORTGAGE, INC.,  
*et al.*  
Defendants.

Civil No. 09cv2721-L(JMA)

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS THE THIRD AND  
SEVENTH CAUSES OF ACTION  
AND GRANTING PLAINTIFF  
LEAVE TO AMEND**

This is an employment discrimination action where Plaintiff alleges she was terminated while on maternity leave and contrary to Defendants' promise that she could return to work on the agreed upon date. Plaintiff filed a complaint alleging pregnancy discrimination in violation of 42 U.S.C. Sections 200e *et seq.*, pregnancy discrimination in violation of California Government Code Section 12945(a), pregnancy discrimination in violation of California Constitution, Article I, Section 8, tortious discharge in violation of public policy, breach of contract, breach of the implied covenant of good faith and fair dealing, failure to pay wages in violation of California Labor Code Sections 201 *et seq.* and 2926, and defamation *per quod*. Defendants filed a motion to dismiss the third and seventh causes of action pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, Defendants' motion is **GRANTED WITH LEAVE TO AMEND.**

1 A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v. Block*, 250  
 2 F.3d 729, 732 (9th Cir. 2001). “While a complaint attacked by a Rule 12(b)(6) motion to  
 3 dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds  
 4 of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation  
 5 of the elements of a cause of action will not do. Factual allegations must be enough to raise a  
 6 right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555  
 7 (2007) (internal quotation marks, brackets and citations omitted). In reviewing a motion to  
 8 dismiss under Rule 12(b)(6), the court must assume the truth of all factual allegations and must  
 9 construe them in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins.*  
 10 *Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions need not be taken as true merely  
 11 because they are cast in the form of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173,  
 12 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Similarly,  
 13 “conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion  
 14 to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998).

15 Defendants argue that the third cause of action for violation of California Constitution  
 16 Article I, Section 8 should be dismissed because there is no private rights of action for violation  
 17 of this constitutional provision. They rely solely on *Himaka v. Buddhist Churches of America*,  
 18 919 F. Supp 332 (N.D. Cal. 1995). In her opposition, Plaintiff relies solely on *Scott v. Solano*  
 19 *County Health and Social Services Department*, 459 F. Supp. 2d 959 (E.D. Cal. 2006).  
 20 Accordingly, neither party has cited any binding authority on this issue of California law.

21 [A] federal court interpreting state law is bound by the decisions of the highest  
 22 state court. . . . Where the state supreme court has not spoken on an issue  
 23 presented to a federal court, the federal court must determine what result the state  
 supreme court would reach based on state appellate court opinions, statutes, and  
 treatises.

24 *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1391 (9th Cir. 1994) (citations omitted).

25 Neither party cites any binding authority addressing the issue whether there is a private  
 26 right of action for damages for pregnancy discrimination directly under the California  
 27 Constitution. Although Article I, Section 8 provides a public policy basis for the tort of  
 28 discharge in violation of public policy, *Badih v. Myers*, 36 Cal. App. 4th 1289 (1995) (pregnancy

1 discrimination); *see also Rojo v. Kliger*, 52 Cal. 3d 65, 89-91 (1990), this alone is not a reason to  
2 find that a private right of action for damages exists directly under the constitution and  
3 independently of the tort claim, as asserted in Plaintiff's complaint. *See Katzberg v. Regents of*  
4 *the Univ. of Cal.*, 29 Cal.4th 300, 324 n.23 (2002).

5 In *Katzberg* the California Supreme Court articulated a framework for determining the  
6 existence of a damages action based on a violation of a California Constitution. *Id.* at 317.  
7 Neither party addressed this framework or briefed the relevant issues. Nevertheless, under  
8 *Katzberg* the existence of an adequate alternative remedy – the common law tort for termination  
9 in violation of public policy – counsels against the finding of a free-standing private right of  
10 action. *See id.* at 326-27; *see also Degraffi v. Cook*, 29 Cal.4th 333, 342-43 (2002).

11 Accordingly, Defendants' motion to dismiss the third cause of action is **GRANTED**.  
12 Plaintiff is granted **LEAVE TO AMEND** her fourth cause of action for tortious discharge in  
13 violation of public policy to include, if she so chooses, Article I, Section 8 of the California  
14 Constitution as another policy basis for her claim.

15 Defendants also maintain that Plaintiff failed adequately to allege the seventh cause of  
16 action for failure to pay wages under California Labor Code Sections 201 and 2926. Plaintiff  
17 alleges she had a right under her employment contract to a 60 days' notice of termination, which  
18 Defendants failed to give. Had Defendants complied with the 60 days' notice requirement, then  
19 Plaintiff would be entitled to 60 days more of wages pursuant to sections 201 and 2926. She  
20 seeks damages for wages lost due to failure to give her the requisite notice.

21 Defendants argue that Plaintiff cannot state a claim for violation of sections 201 and 2926  
22 because these provisions require payment of unpaid wages at the date of termination for services  
23 rendered up to that date. Plaintiff was terminated without notice and therefore did not render  
24 any services during the notice period. Defendants maintain that her claim for unpaid wages  
25 therefore cannot arise under sections 201 and 2926.

26 Neither party cites any case law interpreting sections 201 and 2926 in the context of  
27 failure to give notice. Assuming the truth of Plaintiff's factual allegations, as the court must,  
28 *Cahill*, 80 F.3d at 337-38, Plaintiff was entitled to a 60 days' notice under the terms of her

1 employment contract. Defendants' failure to give notice deprived her of 60 days of work. Had  
 2 Defendants given Plaintiff the requisite notice, they would have been required by sections 201  
 3 and 2926 to pay her on the date of termination the unpaid wages had she earned through that  
 4 date. Although they object to the Labor Code claim, Defendants concede that, assuming  
 5 Plaintiff had a right to 60 days' notice, she may have a breach of contract claim for lost wages  
 6 during the notice period.<sup>1</sup> (Defs' Reply at 3; *see also* Defs' Mem. of P.&A. at 4.)

7 Although sections 201 and 2629 require timely payment of unpaid wages earned through  
 8 the date of termination, the gravamen of Plaintiff's claim is failure to give notice and not failure  
 9 to timely pay her unpaid wages at the time of termination. Based on Plaintiff's allegations, her  
 10 damages arise out of Defendants' failure to give notice rather than their failure to comply with  
 11 sections 201 and 2926. Accordingly, Defendants' motion to dismiss the seventh cause of action  
 12 is **GRANTED**. Plaintiff is granted **LEAVE TO AMEND** to allege breach of contract for  
 13 failure to give 60 days' notice.


14 Based on the foregoing, it is hereby **ORDERED** as follows:

15 1. Defendants' motion to dismiss the third and seventh causes of action is **GRANTED**  
 16 **WITH LEAVE TO AMEND**.

17 2. If Plaintiff chooses to file an amended complaint, she must do so no later than **July 9,**  
 18 **2010**. Defendants shall respond to the amended complaint within the time set forth in Federal  
 19 Rule of Civil Procedure 15(a)(3). If Plaintiff chooses not to file an amended complaint,  
 20 Defendants shall respond within the same period of time calculated from July 9, 2010.

21 **IT IS SO ORDERED.**

22  
 23 DATED: June 24, 2010

24   
 25 M. James Lorenz  
 26 United States District Court Judge

27  
 28 <sup>1</sup> While Plaintiff alleged a breach of contract claim in her fifth cause of action, the  
 claim is not based on failure to give notice.

1 COPY TO:

2 HON. JAN M. ADLER  
3 UNITED STATES MAGISTRATE JUDGE

4 ALL PARTIES/COUNSEL  
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